

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Xiafen “Sherry” Chen,

Plaintiff,

v.

United States of America, et al.,

Defendants.

Case No. 1:19-CV-00045

Hon. Timothy S. Black

**PLAINTIFF’S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE
AMENDED COMPLAINT**

Plaintiff Xiafen “Sherry” Chen, having filed an administrative claim with the Departments of Justice and Commerce on November 1, 2021, moves for an extension of time to file an amended complaint until May 16, 2022, or, if both agencies deny Plaintiff’s administrative claim, thirty days after said denial, whichever is sooner. Defendant, the United States, does not oppose this motion. A memorandum in support is attached hereto.

Respectfully submitted,

/s/ John Hemann

John Hemann
Attorney for Plaintiff

John Hemann*
jhemann@cooley.com
Julie Veroff*
jveroff@cooley.com
COOLEY LLP
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111-4004
Telephone: +1 415 693 2000
Facsimile: +1 415 693 2222

Bingxin Wu*
bwu@cooley.com
COOLEY LLP
55 Hudson Yards
New York, NY 10001-2163
Telephone: +1 212 479 6000
Facsimile: +1 212 479 6275

Bobby Earles**
REarles@cooley.com
COOLEY LLP
444 W. Lake Street, Suite 1700
Chicago, IL 60606
Telephone: +1 312 881 6500

Michele L. Young
michele@micheleyounglaw.com
MICHELE L. YOUNG CO., LPA
8525 Given Road
Cincinnati, OH 45243
Telephone: +1 513 617 9152

Peter Toren*
ptoren@peteratoren.com
PETER J. TOREN ATTORNEY AT LAW
40 East 80th Street
New York, NY 10075
Telephone: +1 646 623 4654

Ashley Gorski*
agorski@aclu.org
Patrick Toomey*
ptoomey@aclu.org
Sarah Taitz*
staitz@aclu.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York NY 10004
Telephone: +1 212 549 2500

Attorneys for Plaintiff
**Admitted Pro Hac Vice*
*** Application for Admission Pro Hac Vice*
Forthcoming

MEMORANDUM IN SUPPORT

Plaintiff Xiafen “Sherry” Chen respectfully moves pursuant to Federal Rule of Civil Procedure 6(b) for an extension of time to file an amended complaint until May 16, 2022, or, if both the Department of Commerce and the Department of Justice deny her administrative claim filed on November 1, 2021, thirty days after said denial, whichever is sooner. The United States does not oppose this motion.

Ms. Chen filed a civil complaint in this Court on January 18, 2019, asserting two FTCA claims: malicious prosecution and false arrest. *Chen v. United States*, No. 1:19-CV-00045, Dkt. 1. On September 23, 2019, Ms. Chen moved for leave to amend the complaint. *See* Dkt. 27. In the proposed amended complaint, Ms. Chen asserted two FTCA claims: malicious prosecution and abuse of process, as well as various *Bivens* claims. *See* Dkt. 27-1. Before this Court ruled on the motion for leave to amend, on June 10, 2021, Ms. Chen requested that the Court stay this action for 120 days in light of the upcoming release of the United States Senate Commerce, Science, and Transportation Committee’s investigation report on alleged abuse and misconduct in the Investigations and Threat Management Service (“ITMS”) within the Department of Commerce (“DOC”) (the “Senate Report”). *See* Dkt. 34. On July 16, 2021, this Court ordered that within 120 days, Ms. Chen shall file her intended motion for leave to amend the complaint. This Court also directed the parties to meet and confer regarding Ms. Chen’s intended motion for leave to file an amended complaint at least fourteen days before Ms. Chen’s filing.

The Senate Committee released the results of its months-long investigation into alleged misconduct within ITMS on July 13, 2021. The Senate Report revealed that ITMS had been knowingly operating outside the law for years, conducting criminal and counterintelligence investigations without proper legal authority to engage in such activities. *See* Minority Staff of

Senate Committee on Commerce, 117th Cong., *Committee Investigation Report on Abuse and Misconduct at the Commerce Dep't* 20-21 (July 2021), <https://bit.ly/3jUL06i>. According to the Report, ITMS's investigation of Ms. Chen represented an instance of "chronic abuse" of ITMS's limited authority. *Id.* at 10, 12, 21.

On September 3, 2021, the DOC released its own report (the "Commerce Report"), based on a five-month programmatic review of ITMS. This report concluded that ITMS lacked legal authority to engage in criminal law enforcement activities, had inadequate policies and procedures for the execution of investigatory authority, and inadequately trained and supervised its agents. *See* U.S. Dep't of Commerce Office of the General Counsel, *Report of the Programmatic Review of the Investigations and Threat Management Service* 7, 9-10, 16, 18-19 (2021), <https://bit.ly/3pXWnOQ>.

Since the release of the Senate and Commerce Reports, Ms. Chen has retained additional counsel—Cooley LLP and the American Civil Liberties Union Foundation—who have been working diligently with existing counsel to assess the impact of the Reports' revelations on Ms. Chen's case. On November 1, 2021, Ms. Chen filed an administrative claim with the Department of Commerce and the Department of Justice, raising several new FTCA claims under Ohio law based on the findings and conclusions of the Senate and DOC reports: (1) intrusion into private affairs; (2) negligent training and supervision; (3) false arrest; (4) intentional and/or negligent infliction of emotional distress; and (5) civil conspiracy.

Ms. Chen's present deadline to move to amend the complaint, or to amend the complaint if the motion for leave is unopposed, is November 15, 2021. On October 28, 2021, the parties met and conferred regarding next steps in this case, including the filing of an amended complaint. The parties have agreed that, in light of Ms. Chen's newly filed administrative claim, it would be most

efficient for both this Court and the parties if the deadline to file a new amended complaint were extended six months until May 16, 2022, or, if both agencies deny the administrative claim, thirty days after said denial, whichever is sooner. Providing Ms. Chen time to exhaust these new administrative claims with the agencies will allow her to present all the claims she intends to raise before this Court at one time in a single amended complaint, rather than doing so piecemeal. The administrative exhaustion requirement precludes that from happening until the new administrative claims have been presented to the DOC and DOJ and decided by those agencies.

Plaintiff therefore respectfully requests that this Court grant this motion for extension of time to file the amended complaint. Plaintiff further asks, at the request of the United States, that the United States' deadline to respond to any motion for leave to amend be set at 60 days following the filing of that motion.

Respectfully submitted,

/s/ John Hemann

John Hemann
Attorney for Plaintiff

John Hemann*
jhemann@cooley.com
Julie Veroff*
jveroff@cooley.com
COOLEY LLP
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111-4004
Telephone: +1 415 693 2000
Facsimile: +1 415 693 2222

Bingxin Wu*
bwu@cooley.com
COOLEY LLP
55 Hudson Yards
New York, NY 10001-2163
Telephone: +1 212 479 6000
Facsimile: +1 212 479 6275

Bobby Earles**
REarles@cooley.com
COOLEY LLP
444 W. Lake Street, Suite 1700
Chicago, IL 60606
Telephone: +1 312 881 6500

Michele L. Young
michele@micheleyounglaw.com
MICHELE L. YOUNG CO., LPA
8525 Given Road
Cincinnati, OH 45243
Telephone: +1 513 617 9152

Peter Toren*
ptoren@peterstoren.com
PETER J. TOREN ATTORNEY AT LAW
40 East 80th Street
New York, NY 10075
Telephone: +1 646 623 4654

Ashley Gorski*
agorski@aclu.org
Patrick Toomey*
ptoomey@aclu.org
Sarah Taitz*
staitz@aclu.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York NY 10004
Telephone: +1 212 549 2500

Attorneys for Plaintiff
**Admitted Pro Hac Vice*
*** Application for Admission Pro Hac Vice*
Forthcoming

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was filed electronically on November 4, 2021 using the Court's CM/ECF system, which serves copies to all parties of record.

/s/ John Hemann
John Hemann
Attorney for Plaintiff